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No. 88——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

In early 1976, the Federal Communications Commission (FCC) prescribed a 9.5% rate-of-return for the Bell System Companies' interstate telephone service, plus a .5% "efficiency incentive." The Bell System Companies promptly filed rates designed to comply with this order. Those rates generated earnings of 9.25% in 1976, 9.59% in 1977, and 10.22% in 1978, for an overall return during those three years of 9.69%. In 1984, the FCC ordered the companies to refund their "excessive" earnings of 1978, without taking account of their earnings in 1976 and 1977. In 1985, the FCC adopted a rule applying the rate-of-return prescription/refund approach underlying its 1984 order to all carriers. A divided panel of the D.C. Circuit affirmed the FCC's 1984 refund order and another divided panel, although remanding the 1985 rule, reaffirmed the FCC's statutory authority to order refunds. A sharply divided *en banc* court with numerous recusals refused to reconsider the panels' decisions. Under these circumstances, the question presented is:

Whether the "rule against retroactive ratemaking," which is grounded in the Communications Act and similar federal regulatory statutes and was heretofore universally recognized as protecting both utilities and customers from *post hoc* rate revisions, bars federal agencies from requiring a utility to make refunds to customers on the ground that its prior earnings exceeded a specified rate of return?

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the court of appeals (those parties who have joined in this petitions are designated by an asterisk):

Petitioners below: New England Telephone and Telegraph Company,* New York Telephone Company,* Nevada Bell, Pacific Bell, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, American Telephone and Telegraph Company, The Mountain States Telephone and Telegraph Company,* Northwestern Bell Telephone Company* and Pacific Northwest Bell Company.*

Intervenors below: Illinois Bell Telephone Company,* Indiana Bell Telephone Company, Inc.,* Michigan Bell Telephone Company,* The Ohio Bell Telephone Company,* Wisconsin Bell, Inc.,* GTE Service Corporation,* GTE Domestic Operating Companies,* United States Telephone Association,* Telecommunications Research and Action Center, National Telephone Cooperative Association, *et al.*, Satellite Business Systems, Southwestern Bell Telephone Company, and Bell Atlantic Telephone Companies.

Respondents below: Federal Communications Commission and the United States of America.

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* The statement pursuant to Sup. Ct. Rule 28.1 is set forth in Appendix I, 167a-168a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the D.C. Circuit in the case here under review (hereafter the *"Refund Case"*) (Pet. App. 1a-39a) is reported at 826 F.2d 1101. The opinion of the D.C. Circuit in a closely related case (hereafter the *"Rulemaking Case"*) (Pet. App. 141a-159a) is reported at 836 F.2d 1386. The opinions accompanying the orders denying rehearing *en banc* in both the *Refund* and *Rulemaking Cases* (Pet. App. 133a-140a and 160a-166a) are not yet reported. The initial order of the Federal Communications Commission ("FCC" or "Commission") in the *Refund Case* (Pet. App. 40a-85a) is reported at 102

F.C.C. 2d 52. The FCC's orders denying reconsideration (Pet. App. 86a-120a and 121a-129a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 130a-132a) was entered on August 21, 1987. Petitions for rehearing and rehearing *en banc* were denied on November 2, 1988 (Pet. App. 133a-140a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 205 of the Communications Act, 47 U.S.C. § 205, provides:

> (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.
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> (b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or

> agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

STATEMENT OF THE CASE

In precisely defining and limiting the FCC's authority regarding telephone company and other communications carriers' rates, the Communications Act typifies the federal statutes that equip agencies with ratemaking authority.[1] Under Section 203, 47 U.S.C. § 203, carriers must file tariffs setting forth the charges and other terms and conditions for their service; thereafter they must render service in strict compliance with those tariffs. Under Section 204(a), 47 U.S.C. § 204(a), the FCC may temporarily suspend and then investigate new tariff rates filed by a carrier; if it determines that these rates are unreasonable, the Commission may prescribe the charges to be collected in the future.[2] Under Section

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[1] Other statutes with similar ratemaking schemes are the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, the Federal Power Act, 16 U.S.C. § 791, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

[2] Under Section 204(a) the FCC may also order a carrier to account for revenues pending an investigation and may thereafter require the carrier to refund that portion of its increased charges that the FCC ultimately finds to be not justified. *See also*, 15 U.S.C. § 717c(e) (Natural Gas Act); 16 U.S.C. § 824d(e) (Federal Power Act); 49 U.S.C. § 10705(b) (Interstate Commerce Act).

205(a), 47 U.S.C. § 205(a), the Commission may, on its own motion or upon complaint, initiate an investigation of a carrier's existing rates; if the Commission determines that the rates are unreasonable, its only remedy is to prescribe the carrier's future charges.[3]

The FCC's First Prescription of a Rate of Return—the Nader Case. In 1971, the FCC initiated an investigation under Section 204(a) to determine the lawfulness of new tariffs filed by the American Telephone & Telegraph Company and its Bell System Companies (hereafter collectively referred to as "Bell").[4] The Commission divided its investigation into two phases, the first of which focused upon Bell's authorized rate of return,[5] while a later phase was to consider the many other issues necessary to determine the lawfulness of the Bell rates. Phase I of the proceeding was concluded in November 1972, when the FCC decided that Bell was entitled to a rate of return of 8.5%. Bell immediately filed new, higher rates designed to achieve this return, and the FCC allowed them to become effective subject to its ultimate

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[3] *See also*, 15 U.S.C. § 717d(a) (Natural Gas Act); 16 U.S.C. § 824e(a) (Federal Power Act); 49 U.S.C. § 10704(a)(1) (Interstate Commerce Act).

In addition to the ratemaking authority given to the FCC by Sections 203-205 of the Communications Act, the Commission also has authority under Sections 206-209 of the Act, 47 U.S.C. §§ 206-209, to adjudicate the lawfulness of a carrier's charges and award damages to customers if those charges are unlawful. *See*, p. 14, n.19, *infra*.

[4] *See generally, Nader* v. *FCC*, 520 F.2d 182, 187-191 (D.C. Cir. 1975), setting forth, in detail, the many steps involved in the FCC's 1971 investigation.

[5] As the FCC and the Court of Appeals made clear in the *Rulemaking Case*, the "rate of return" used by the Commission in ratemaking proceedings is the "minimum" required by the Constitution to avoid confiscation of a carrier's property. (Pet. App. 145a).

decision as to the many other undecided questions to be considered in Phase II.[6]

Bell's customers and competitors sought review of this decision in the D.C. Circuit arguing, *inter alia*, that the FCC erred in allowing Bell to raise its rates in this manner. The court of appeals disagreed. It upheld the FCC's interim prescription of a rate of return pending the completion of a rate investigation on the ground that "ratemaking is a complex and difficult task" which frequently requires "several consecutive proceedings." *Nader* v. *FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).[7]

The FCC's Misapplication of Nader—the Refund Case. In January 1975, Bell filed new proposed tariffs containing rates designed to generate a return above the 8.5% permitted by the Phase I decision in the then still ongoing Bell rate investigation. The FCC rejected the filing on that basis, but agreed to decide whether changes in the financial markets or in Bell's capital structure justified a higher rate of return. *In the Matter of American Telephone & Telegraph Co.*, 57 F.C.C.2d 960 (1976). On February 4, 1976, the Commission concluded that changed circumstances justified a 9.5% rate of return, with an additional .5% efficiency incentive. Accordingly, it prescribed a 9.5% rate of return, but held that Bell earnings of up to 10% or less "shall not require any

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[6] *Nader*, 520 F.2d at 190.

[7] No refund issue was before the court in *Nader*. However, *in dicta*, the court stated that the FCC's interim prescription order protected Bell from the possibility of refunds based on contentions that an 8.5% rate of return was too high and that the FCC retained full latitude to order refunds on all other lawful grounds, including the yet-to-be-decided issues in Phase II of the rate investigation pertaining to the companies' income, costs and rate base. 520 F.2d at 204-05 n.25. These types of refunds could conventionally be ordered pursuant to Section 204(a) after a general rate investigation where, as in *Nader*, the FCC had suspended carrier-initiated rates and subjected them to an accounting order. *See*, p. 3, n.2, *supra*.

downward adjustment of [Bell's] overall interstate rates. . . ." *Id.* at 973.[8]

Bell immediately filed rates based on the 9.5% return prescribed by the Commission, and the FCC allowed them to become effective. However, in 1976 those rates produced only 9.25%, about $100 million less than would have been generated had Bell achieved the 9.5% return that the FCC had prescribed and $300 million less than the maximum 10.0% permitted by the Commission.[9] Those same rates in 1977 resulted in a return of 9.59%, about $180 million less than Bell would have received had it earned 10.0%.[10] Without changing those rates, Bell in 1978 earned 10.22%—$101 million more than it would have realized had it achieved a 10.0% return.

After receiving Bell's report of its 1978 earnings, the FCC published a notice of inquiry to consider alternative regulatory responses, ranging from one that would have characterized the prescribed rate of return as a "target" to be used in designing tariffs, to another that would have treated the 1976 order as establishing a 10% ceiling on Bell earnings with refunds of earnings above the

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[8] In March 1977, the FCC terminated the general investigation that it had commenced in 1971, finding the 1971 Bell rates to be "just and reasonable, and therefore lawful, pursuant to 47 U.S.C. §§ 201-5." *In the Matter of AT&T*, 64 F.C.C.2d 1, 110 (1977), *on reconsideration*, 67 F.C.C.2d 1429 (1978), *modified*, 72 F.C.C.2d 1 (1979).

[9] Comments of AT&T in Response to Notice of Inquiry, CC Dkt. No. 79-187 (filed November 13, 1979), C.A. Jt. App. 188. ("C.A. Jt. App." refers to the Joint Appendix in the court of appeals). Bell's 1976 rates became effective on February 27, 1976. Bell earned 8.83% in 1975, *id.* at 189; assuming that it earned the same return during the first two months of 1976, its return for the last 10 months of 1976, after its new rates became effective, was 9.33%.

[10] *Id.*

ceiling.[11] It took more than five years for the Commission to decide among these alternatives.

Ultimately, on December 11, 1984, the FCC held that Bell must refund $101 million of its 1978 earnings, plus interest, by reducing rates in 1985-86 to levels below those that the companies would otherwise have been entitled to charge. Pet. App. 40a-85a.[12] In doing so, the FCC took the position that Section 205 and Section 4(i) of the Communications Act gave it authority to order a refund to enforce its 1976 prescription order whenever Bell's earnings exceeded 10.0%. The FCC refused to allow Bell any credit or offset for the $100 million of deficient 1976 earnings and treated as irrelevant the fact that the rates which Bell filed in 1976 produced a return for the 1976-1978 period of 9.69%, well within the range established by the FCC in its 1976 prescription order.[13]

Bell sought review of the FCC's order in the D.C. Circuit, challenging the FCC's authority to order refunds

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[11] *In the Matter of AT&T Earnings During 1978*, 75 F.C.C.2d 412 (1979) (C.A. Jt. App. 12-22).

[12] The refund ordered by the FCC was apportioned among AT&T and the various Bell Operating Companies ("BOCs"), which by this time had been divested from AT&T, on the basis of each company's investment in assets devoted to interstate service in 1978. *See*, Pet. App. 54a-55a & n.28. On this basis, the BOCs bore about 68.5% of the total liability for the refund.

[13] Requests for stays of the refund order were denied, FCC No. 85-573 (Oct. 30, 1985) (C.A. Jt. App. 73), and the companies filed tariffs that reduced their charges for the ensuing year. This Court has ample equitable powers to allow the BOCs to recapture this refund, should it ultimately reverse the D.C. Circuit. *See, United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229-30 (1965); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200-201 (1947); *Public Service Co. of N.H.* v. *FERC*, 600 F.2d 944, 961 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979); *Tennessee Valley Mun. Gas Ass'n* v. *FPC*, 470 F.2d 446, 452-53 (D.C. Cir. 1972); *Williams* v. *Washington Metropolitan Area Transit Comm'n*, 415 F.2d 922, 941-42 & n.97 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

to enforce a rate-of-return prescription order. A divided panel affirmed the refund order as a valid exercise of the FCC's authority under Sections 205 and 4(i) of the Communications Act. Pet. App. 1a-39a. *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101 (D.C. Cir. 1987). The majority (Judge Mikva and District Judge Parsons) recognized that the FCC's "current regulatory scheme is asymmetric," because "carriers must refund excess earnings, but they are not compensated for shortfalls." Pet. App. 14a. However, it concluded that carriers "have no statutory entitlement to a perfectly balanced regulatory scheme; rather, they are entitled only to earn an overall reasonable return." *Id.*

Judge Buckley dissented. He seriously questioned the statutory authority of the FCC to utilize a rate-of-return prescription/refund scheme, noting that:

> "[f]or more than fifty years, the Communications Act has been understood to establish a precise, express statutory scheme governing refunds and the setting of rates. Never before has Section 4(i) been held to authorize refunds." Pet. App. 20a-21a.

For that reason he disagreed with the FCC's imposition in 1984 of a refund liability based on a 1976 prescription order that did not foreshadow such relief. *Id.* at 20a-39a.

The FCC's Extension of Its Refund Approach to All Carriers—the Rulemaking Case. During the final stages of the FCC's consideration of the refund order, it instituted a proceeding to consider a rule that would extend the approach underlying that order to all carriers. On September 30, 1985, the FCC adopted an "automatic" refund rule based solely on Sections 205(a) and 4(i), declaring that it would biennially determine a reasonable rate of return for carriers and that they would be required to refund earnings if they exceed that return, plus a small "buffer," without any setoff for prior inade-

quate earnings. Moreover, the FCC rule provided that carriers would be required to refund "excessive earnings" from one category of service during a two-year period, even if their overall earnings on interstate services were deficient.

Bell and a number of other carriers petitioned the D.C. Circuit to review this rule. A majority of the panel (again Judge Mikva, this time joined by Judge Bork) endorsed the *Refund Case*, stating that it "clearly defeats the claim that a refund scheme in conjunction with rate-of-return regulation is necessarily incompatible with the regulatory scheme embodied in the Communications Act." Pet. App. 150a. *AT&T* v. *FCC*, 836 F.2d 1386, 1392 (D.C. Cir. 1988). The court went on, however, to condemn as arbitrary and capricious the particular scheme embodied in the rule and remanded the case to allow the Commission to refashion a new rate-of-return prescription/refund mechanism.

Judge Starr concurred in the judgment, but disagreed that the FCC was authorized to promulgate rate-of-return prescription/refund rules. Pet. App. 152a-159a. In his view:

> "Congress constructed the [Communications] Act so that the Commission's remedial power is limited to prospective relief: when the Commission determines that existing rates are excessive it cannot order a refund of past payments under the revoked rate. Rather, the FCC can only correct the problem through a *prospective* prescription under section 205." *Id.* at 155a (emphasis in original).

Denial of Rehearing En Banc. Petitions for rehearing *en banc* in the *Refund Case* were filed by the Bell Companies, while the FCC filed a conditional rehearing petition in the *Rulemaking Case*. The petitions were denied

by a closely divided *en banc* court from which several members of the Circuit were recused.[14]

Judge Starr dissented (joined by Judges Williams and Buckley). He argued that the FCC's approach did "violence to well-settled, salutary doctrines, such as the bar on retroactive ratemaking and the filed rate doctrine." Pet. App. 135a, 162a. He lamented the fact that, because a number of judges did not participate, the issue of the FCC's authority could not qualify for *en banc* treatment. Under these circumstances, he described the law of the D.C. Circuit "on a pivotal statutory issue cutting across agency lines" as "distressingly unsettled." *Id.*

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's decision in this case is inconsistent with more than 50 years of settled precedent in this Court, as well as the courts of appeals. By prescribing a rate of return and then requiring carriers to refund earnings above that rate, the FCC has violated the "rule against retroactive ratemaking" codified in the Communications Act, as well as other comparable federal regulatory statutes, and has thereby upset the balance between utility and customer interests established by Congress in those statutes. This Court should exercise its certiorari jurisdiction to review the decision below because it threatens the ratemaking schemes that apply to most utilities whose rates are regulated by the federal government.

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[14] Four judges (Wald, Robinson, Mikva and Edwards) voted to deny rehearing in both cases; three (Starr, Buckley and Williams) would have set both for rehearing as to the FCC's authority to order refunds; three (Ruth B. Ginsburg, Silberman and Douglas H. Ginsburg) abstained in both cases; and one (Sentelle) abstained in the *Rulemaking Case*, while voting to deny rehearing in the *Refund Case* because of "multiple recusals." Pet. App. 133a-140a and 160a-166a.

I.

The rule against retroactive ratemaking operates in a balanced manner, protecting customers from *post hoc* rate increases for those years in which a utility's earnings are deficient, but letting utilities keep earnings in years when they exceed the rate of return upon which prior rates were premised. The FCC's rate-of-return prescription/refund scheme destroys that balance between customer and utility interests.

Ratemaking involves four basic questions, all of which are essentially predictive: (1) What assets are used by the utility in providing its regulated service and thus are entitled to be included within its "rate base?" (2) What rate of return will the utility be allowed to earn on its rate base? (3) What costs in providing its service can the utility properly claim should be reimbursed by its customers? (4) What rates will allow the utility to cover its costs and earn its authorized return? [15]

For large and complex carriers, like the Bell Companies, it is impossible to predict with precision the myriad factors ultimately affecting their actual return.[16] Where actual costs exceed the estimates used in setting rates, the carrier's actual earnings may fall below the envisioned rate of return. Conversely, where the economy picks up and demand for service increases, the carrier may earn more than that rate of return. Thus, the return that a carrier in fact earns will almost never be the precise rate of return upon which its rates were initially premised.

It is uniformly recognized that, notwithstanding fluctuations in the many factors that affect return, carriers

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[15] *See*, 1 A. Priest, *Elements of Public Utility Regulation* 45 (1969).

[16] Ratemaking is an "empiric" process that "is fluid and changing." *Board of Trade* v. *United States*, 314 U.S. 534, 546 (1942).

that place into effect agency-prescribed rates are thereafter protected from refund claims by customers arguing that those rates have become unreasonably high; conversely, such carriers may not retroactively seek to obtain increased charges on the ground that the agency's prescription order has led to inadequate returns. *See, e.g., Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932):

> "Specific rates prescribed for the future . . . become the legal rates. . . . If [the Interstate Commerce Commission] sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate offered under the order upon the ground that it was unreasonably low." *Id.* at 387-88.
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> "Where the Commission has . . . declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time . . . subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate." *Id.* at 390.[17]

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[17] The rule of *Arizona Grocery* builds upon principles established in earlier cases holding that a carrier may keep the benefits of high earnings, but conversely that it must bear the losses in years where its actual return was deficient. As this Court explained in *Board of Public Utility Comm'rs* v. *New York Telephone Co.*, 271 U.S. 23, 31-32 (1926):

> "The revenue paid by the customers for service belongs to the company. . . . If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. . . . And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future."

See also, FPC v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942).

Arizona Grocery plainly prohibits the FCC from ordering refunds to a carrier's customers where its rates have been prescribed and intervening circumstances have pushed the carrier's earnings to levels beyond those anticipated by the Commission. Similarly, a regulatory agency may not order such general refunds where the carrier has initiated rates that have not been suspended and investigated by the agency. *See, Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951) (describing the "filed-rate doctrine"). In both settings the courts have repeatedly reaffirmed that federal statutes like the Communications Act grant agencies only prospective ratemaking authority. *See, Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578 (1981); *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968); *Atlantic Ref. Co.* v. *Public Service Comm'n*, 360 U.S. 378, 389 (1959); *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 468-72 (1959); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).[18] This principle, which has come to be known as "the rule against retroactive ratemaking," bars " 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.' " *Arkansas Louisiana Gas*, 453 U.S. at 578, *quoting City of Piqua* v. *FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979).[19]

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[18] *See also, TRT Telecommunications Corp.* v. *FCC*, 857 F.2d 1535, 1546, 1547 (D.C. Cir. 1988); *Dorchester Gas Producing Co.* v. *FERC*, 848 F.2d 634, 637 (5th Cir. 1988); *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465, 1471, *modified*, 831 F.2d 557 (5th Cir. 1987); *City of Girard* v. *FERC*, 790 F.2d 919, 920 (D.C. Cir. 1986); *United Gas Pipe Line Co.* v. *FERC*, 657 F.2d 790, 794 (5th Cir. 1981); *Public Service Co. of N.H.* v. *FERC*, 600 F.2d at 957-58; *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336, 345 (D.C. Cir.), *cert. denied*, 420 U.S. 946 (1975).

[19] There is a statutory exception to the rule against retroactive ratemaking, but it is not applicable here. As noted, p. 3, n.2, under Section 204(a) the FCC, like other agencies, may suspend and investigate newly filed rates and impose an accounting order upon a carrier for the purpose of ordering refunds if the Commission's investigation ultimately proves that the carrier's rates

The rule against retroactive ratemaking serves at least two central purposes, both of which are frustrated by the decision below. First, it creates a stable environment in which both customers and carriers can rest assured that ratemaking agencies are barred from "embroiling current and future rate regulation with [the] function of making correctives for excess or insufficiencies of rates charged in the past." [20] Second and more importantly, the rule against retroactive ratemaking balances the rights of carriers and customers by imposing equally upon both of them the risk that unanticipated changes in costs, revenues or other factors will either elevate or depress a carrier's actual return.[21]

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were too high when filed. In this case, the FCC disclaims any reliance upon Section 204(a) for at least two reasons: (1) No suspension, investigation and accounting order was entered in connection with Bell's rate of return when it filed its rates in 1976; (2) Bell's rates, which generated earnings below the 10.0% ceiling for the first two years in which they were in effect, were perfectly lawful when filed even under the FCC's own reasoning.

Also as noted, p. 4, n.3, Sections 206-209 of the Communications Act permit an individual customer to file a complaint seeking damages for a violation of the Act. However, in proceedings under these sections, the burden of proof is on the customer and the carrier is entitled to a hearing as to whether its rates were lawful at the time of the disputed charges. Moreover, relief is limited "to actual damages rather than to the full overcharge that would have been available had the FCC ordered an investigation [under Section 204(a)]." *Aeronautical Radio, Inc.* v. *FCC*, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). *See also, Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979). In this case, the Commission has never sought to justify its refund order by relying on these provisions, which involve the exercise of the FCC's adjudicative, not its ratemaking, authority.

[20] *American Public Gas Ass'n* v. *FPC*, 567 F.2d 1016, 1057 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). *See also, Columbia Gas Trans. Co.* v. *FERC*, 831 F.2d 1135. 1141 (D.C. Cir. 1987).

[21] This rule represents a specific application in a ratemaking context of a more general proposition, recently confirmed by this

The FCC has violated the rule against retroactive ratemaking embodied in the Communications Act, disrupting this carefully crafted balance between carrier and customer interests, and a sharply divided D.C. Circuit, left short-handed by multiple recusals, has failed to stop it. *Compare, United States* v. *SCRAP*, 412 U.S. 669, 697 (1973), where this Court reversed the D.C. Circuit for not paying heed to the Interstate Commerce Act's "careful accommodation of the [carrier and shipper] interests involved" in that statute. Instead of investigating and prescribing rates, the Commission prescribed only a rate of return. It then required the carriers to refund any earnings that they realized above that return, while denying them any opportunity to recover deficiencies in their prior earnings. In this way, the FCC has deprived carriers of the benefits implicit in the statutory scheme—*i.e.*, that they can keep earnings which exceed those expected by the FCC at the time of a prescription order—and has placed upon carriers all of the risks that intervening events will depress their earnings below those levels anticipated by the FCC.

Those risks are clearly demonstrated by the fact that, despite its best efforts in 1976 to design rates to achieve the 9.5% minimum level of earnings allowed by the FCC, Bell earned only 9.25% that year, about $100 mil-

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Court in *Bowen* v. *Georgetown University Hospital*, —— U.S. ——, 57 U.S.L.W. 4057, 4058 (Dec. 12, 1988), that:

> "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *See Brimstone R. Co.* v. *United States*, 276 U.S. 104, 122 (1928) ('The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words')."

Under the Administrative Procedure Act, 5 U.S.C. § 551(4), ratemaking is a form of rulemaking. Therefore, *Bowen* and similar cases condemn any form of retroactive ratemaking that is not explicitly sanctioned by the Communications Act.

lion less than would have been produced if it had achieved a reasonable rate of return. The FCC's decision forced Bell to bear the consequences of the unforeseeable increase in costs or decrease in revenues that depressed its earnings in 1976, while at the same time forcing it to refund to customers its "excessive" 1978 earnings brought about by opposite forces operating on its costs or revenues. The Commission's action vividly illustrates the manner in which its violation of the rule against retroactive ratemaking has disturbed the balance expressed in the Communications Act between customer and carrier rights.

II.

The FCC's rate-of-return prescription/refund scheme was based entirely on Sections 205(a) and 4(i) of the Communications Act. Neither supports the agency's action.

A.

Section 205(a) on its face condemns the position taken by the FCC in this case; codifying the rule against retroactive ratemaking, it provides that if a carrier's charges are excessive the FCC's only remedy is to prescribe the "just and reasonable" charges that are "to be thereafter observed." Thus, Section 205(a) is entirely prospective and provides no basis for ordering refunds based on prior excessive earnings.

Second, as previously noted, p. 3, n.2, *supra*, Section 204(a) explicitly provides for refunds when a carrier initiates new rates and the Commission suspends and investigates them and requires the carrier to account for its charges. The fact that Congress equipped the FCC with refund authority in that context, but not under Section 205(a), clearly shows that Congress' withholding of refund authority under Section 205(a) was not inadvertent. As is shown by Judge Starr's opinion in the *Rulemaking Case*, Pet. App. 157a-158a, relevant legislative history further confirms this conclusion.

Third, had the FCC fully exercised its prescription authority in the manner contemplated by Section 205(a) and specified the rates that Bell must charge customers, under the principles of *Arizona Grocery* the Commission would have been powerless to order Bell to make refunds to its customers even if subsequent events elevated its return above levels that were just and reasonable. As Judge Starr observed in his opinion in the *Rulemaking Case*,

> "it is passing strange to allow the Commission to order refunds (and thereby undercut the Congressionally ordained values of stability and predictability) where a rate-of-return prescription is exceeded, but not where a just and reasonable charge is exceeded." Pet. App. 157a.

Finally, Section 205(b) empowers the FCC to enforce compliance with prescription orders by imposing substantial fines when a carrier "knowingly fails or neglects to obey an order made under the provisions of this section. . . ." The Commission never found in the *Refund Case* that Bell "knowingly fail[ed] or neglect[ed]" to comply with the FCC's rate-of-return prescription. Instead, the Commission takes the position, flatly inconsistent with Section 205(b), that carriers bear an absolute liability to refund monies to customers whenever their return exceeds a prescribed level, "however innocently" the carriers behave. Pet. App. 9a.

B.

Relying upon Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), the court of appeals held in the *Refund Case* that the FCC had authority to create an "asymmetric" ratemaking scheme that disturbs the statutory balance between carrier and customer rights. In reading Section 4(i) as empowering the FCC to so change the ratemaking regime established by the Communica-

tions Act, the D.C. Circuit has rendered a decision that conflicts with those of this Court and other Circuits.

Section 4(i) allows the FCC to take only such action as is "not inconsistent with" the other provisions of the Communications Act and is "necessary in the execution of its functions." It does not permit the Commission to act in a manner that is neither consistent with Section 205 nor necessary to achieve the purpose of that section.

Moreover, this Court, other federal appellate courts, and the D.C. Circuit itself, when interpreting Section 4(i) and like provisions of other regulatory statutes, have held that a power asserted under such a provision must be consistent not only with the specific terms of the statute, but also with the statute's general structure and policies. For example, in *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973), the Second Circuit rejected the FCC's argument that Section 4(i) of the Communications Act authorized it to require AT&T to obtain advance approval from the Commission before filing tariff revisions:

> "In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier-initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation." *Id.* at 880 (footnote omitted).

On similar reasoning, this Court in *FPC* v. *Texaco Inc.*, 417 U.S. 380, 394 (1974), concluded that Section 16 of the Natural Gas Act, 15 U.S.C. § 717*o*, which corresponds to Section 4(i) of the Communications Act, "does not authorize the Commission to set at naught an explicit provision of the Act." The court of appeals' broad reading of Section 4(i) as allowing the FCC to restructure the ratemaking regime established by the

Communications Act conflicts with this Court's decision in *Texaco*, the Second Circuit's decision in *AT&T* v. *FCC*, as well as many other cases.[22]

III.

The opinions of Judges Mikva and Starr, standing alone, reveal the significance of the issue presented here. In his opinion in the *Refund Case*, Judge Mikva proclaimed that an agency can change the scheme of regulation embodied in its enabling act from one in which there is a fair balance of customer and utility rights to one that is "asymmetric;" in his view, the only constraint on agency action is the constitutional limitation that utilities should have an opportunity "to earn an overall reasonable return." Pet. App. 14a.[23] By con-

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[22] *See, e.g., Murphy Oil Corp.* v. *FPC*, 431 F.2d 805, 810 (8th Cir. 1970) (Section 16 of Natural Gas Act "is not an enlargement of the specific authority granted the Commission under §§ 4, 5 and 7 of the Act"); *Hirschey* v. *FERC*, 701 F.2d 215, 218 (D.C. Cir. 1983) (to imply from Section 309 of the Federal Power Act the authority to vacate final and nonreviewable license exemptions "would make a sham of the carefully crafted license exemption regulations and render superfluous the *specific* revocation procedures set forth in [the Commission's rules]") (emphasis in original); *Turner* v. *FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975) (affirming FCC decision that, notwithstanding Sections 4(i) and 303(r) of the Communications Act, "the authority to order reimbursement of legal expenses should not be implied 'absent specific statutory authority' ").

Cf., CAB v. *Delta Air Lines, Inc.*, 367 U.S. 316, 325 (1961), where this Court, notwithstanding the presence in the Federal Aviation Act of a supplementary-powers provision (Section 204(a), 49 U.S.C. § 1324(a)) equivalent to the Communications Act's Section 4(i), struck down an action of the CAB which was inconsistent with the Act's provisions governing certificates of public convenience and necessity, stating that "the specific instructions set out in the statute should not be modified by resort to such generalities as 'administrative flexibility' and 'implied powers.' "

[23] Judge Mikva's blurring of the distinction between constitutional and statutory limitations on an agency's ratemaking author-

trast, Judge Starr recognized in the *Rulemaking Case* that Congress had, "[i]n crafting [the] elaborate scheme" embodied in the Communications Act, Pet. App. 153a, carefully specified customer and carrier rights in the ratemaking process, and he decried the resort to formless provisions, like Section 4(i), to permit agencies to rearrange the regulatory structures established for them by Congress.

The recusal of a number of judges of the D.C. Circuit prevented that court from assembling *en banc* to reconsider the approach taken by Judge Mikva in disposing of an issue that affects virtually every industry whose rates are regulated by the federal government.[24] The "distressingly unsettled" state of the law of the D.C. Circuit (Pet. App. 135a, Starr, J., dissenting)—the court that reviews most of the ratemaking cases decided by federal agencies—fully justifies exercise by this Court of its certiorari jurisdiction.[25]

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ity is inconsistent with this Court's recent decision in *Duquesne Light Co.* v. *Barasch*, —— U.S. ——, 57 U.S.L.W. 4083, 4087 (Jan. 11, 1989). In any event, the FCC's prescription/refund scheme would over time violate even the constitutional principle that carriers are entitled to a reasonable return on their investment. *See, id.*; *FPC* v. *Hope Natural Gas Co., supra.* Inevitably, if carriers are required to return "excess" earnings above some reasonable rate of return, but are forced to absorb shortfalls in years that their earnings are deficient, they will systematically be denied an opportunity to earn a reasonable return.

[24] Rule 35(a) of the Federal Rules of Appellate Procedure provides that rehearing *en banc* will be granted only on the vote of a majority of the active members of the court of appeals, and the D.C. Circuit has interpreted that rule to require a majority "regardless of recusals or temporary absences." *Handbook of Practice & Internal Procedures*, U.S. Ct. App., D.C. Cir. § XIII.B.2, p. 68 (Aug. 1, 1987).

[25] *See, Webster* v. *Doe*, —— U.S. ——, 108 S. Ct. 2047 (1988) (certiorari granted to resolve important issue after evenly divided D.C. Circuit denied rehearing *en banc*). *See also, John Hancock Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939); *Maggio* v. *Zietz*, 333

CONCLUSION

The petition for a writ of certiorari should be granted.

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